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No. 02-1577

In The
Supreme Court of the United States

CITY OF COMBES, TEXAS, *et al.*,

Appellants,

v.

EAST RIO HONDO WATER SUPPLY CORPORATION, *et al.*,

Appellees.

On Appeal From The United States District Court For The Southern District Of Texas (Three Judge Court)

APPELLANTS' REPLY TO MOTION TO AFFIRM

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APPELLANTS' REPLY TO MOTION TO AFFIRM

Whether the East Rio Hondo Water Supply Corporation is a political subdivision under the Voting Rights Act does not and should not turn on any single characterization in state law or by whether Texas has chosen to denominate it as a "political subdivision." The appropriate analysis should be based on federal law, and thus, on a comprehensive review of the entity's functions and relationship to the state. *United States v. Sheffield Board of Comm'rs,* 435 U.S. 110, 126-28 (1978). Since there is no dispute about whether Texas is a covered jurisdiction under Section 5, it follows that all Texas political units that exercise control over critical aspects of the voting process are also covered. *Sheffield,* 435 U.S. at 127. To determine whether the East Rio Hondo Water Supply Corporation is a "political subdivision" of the state, two basic questions should be considered:

1) Can the entity be defined by a discrete geographic area within a covered state?

2) Is the entity a state actor in its functions and in its conduct of voting?

Sheffield, 435 U.S. at 163-164 and 164 n.15. A fair review of Texas law and of the facts in this case results in an affirmative determination on each question.

A. The East Rio Hondo Water Supply Corporation Functions as a Political Unit of the State in a Defined Geographic Region.

The East Rio Hondo Water Supply Corporation functions in a specific geographic area of the State of Texas. The Texas Commission on Environmental Quality

Commission (TCEQ) (formerly the Texas Natural Resource Conservation Commission, TNRCC) granted the East Rio Hondo Water Supply Corporation a Certificate of Convenience and Necessity (CCN).[1] With the CCN, East Rio Hondo Water Supply Corporation was granted **exclusive** authority to provide retail water and sewer utility service to the public within the geographic area defined by its CCN. TEXAS WATER CODE ANN. § 13.242 (Vernon 2000). Because of the authority it has been granted by the state, even for residents of the City of Combs, who also reside within the geographic area of the East Rio Hondo Water Supply Corporation, only two options exist for securing water service. One, arrange for such service from the East Rio Hondo Water Supply Corporation; or two, dig a well. Even if the City of Combs had the capacity and willingness to provide water to its residents, it could not do so without the consent of the East Rio Hondo Water Supply Corporation. *Id.*

The East Rio Hondo Water Supply Corporation also has the power of eminent domain, the power to take private property for public use. TEXAS WATER CODE ANN. § 49.222 (Vernon 2000). With the power of eminent domain the East Rio Hondo Water Supply Corporation acts with the authority of the state and has the obligation to comply with the provisions of the Fifth Amendment of the United States Constitution. *Weingarten Realty Investors v. Albertson's Inc.*, 66 F. Supp. 825, 841 (S.D. Tex. 1999). If the East

[1] A CCN is a required certification issued by the state authorizing a utility to be the sole provider of water service within the geographic area defined by the CCN. TEXAS WATER CODE ANN. §§ 13.241 & 13.242 (Vernon 2000).

Rio Hondo Water Supply Corporation condemns private property and fails to compensate the landowner, 42 U.S.C. § 1983 provides a vehicle to enforce the landowner's Fifth Amendment rights. *Id.*

State law also authorizes the East Rio Hondo Water Supply Corporation to enter and inspect public or private property, for the purpose of determining the condition, value, and usability of the property with reference to any proposed location of works, improvements, plants, facilities, equipment, or appliances. TEXAS WATER CODE ANN. § 49.221 (Vernon 2000).

Not only does the East Rio Hondo Water Supply Corporation have a distinct defined geographic boundary, the East Rio Hondo Water Supply Corporation is a state actor, deriving its authority within those boundaries from state law.

B. The East Rio Hondo Water Supply Corporation Conducts Elections Pursuant to State Law.

The East Rio Hondo Water Supply Corporation also is a state actor in the conduct of its elections. Within the boundaries of its CCN and pursuant to state election rules (although not the Texas Election Code) the East Rio Hondo Water Supply Corporation conducts voting for its board of directors and officers that permits voting by residents of its CCN geographic area whether they are customers or not, so long as they pay a $100 membership fee. Thus, state law regulates when these elections may be held. TEXAS WATER CODE ANN. § 67.007 (Vernon Supp. 2003) (elections must be held between January 1 and May 1). State law requires that directors serve staggered, two or three year terms of office. TEXAS WATER CODE ANN.

§ 67.005 (Vernon Supp. 2003). State law provides the number of directors that may serve on the governing board. TEXAS WATER CODE § 67.005 (not more than 21 directors). State law governs what officers will be elected from among the board of directors and what their salaries will be. TEXAS WATER CODE ANN. § 67.006 (Vernon Supp. 2003). State law places limits on the number of votes that residents of the geographic area may cast. TEXAS WATER CODE § 67.006 (one per member regardless of the number of memberships owned). State law requires that the board of directors be elected by the membership of the entity. TEXAS WATER CODE § 67.005. These facts, taken together with the examples contained in appellants' Jurisdictional Statement (J.S. pp. 8-9), establish that the East Rio Hondo Water Supply Corporation clearly conducts elections as a state actor and functions within the boundaries of its CCN as a political unit of the state.

C. A Comprehensive Review of the Functions of the East Rio Hondo Water Supply Corporation Shows that it is a "Political Subdivision."

As set out above and in appellants' Jurisdictional Statement, the question of whether the East Rio Hondo Water Supply Corporation is a political subdivision of the state under the Voting Rights Act should not be resolved by looking at a single state provision in isolation. When the state provisions characterizing water supply corporations as political subdivisions are considered with a comprehensive review of its functions and the source of its authority it becomes clear that the East Rio Hondo Water Supply Corporation is a "political subdivision" under the Voting Rights Act. The East Rio Hondo Water Supply Corporation has been given by the state, the exclusive

authority to provide a vital public service in a discrete geographic area; it conducts elections for its governing board and officers under authority of state law and in a manner required by state law; it is afforded other governmental powers, and has been defined as a "political subdivision" of the state for the purpose of securing important government financial programs; and it must adhere to the state's open government requirements. Taken together all these facts can support no other conclusion but that the East Rio Hondo Water Supply Corporation is a "political subdivision" under the VRA.

The isolated rulings of a Texas state court, and the Texas Attorney General opinions, which reached opposite conclusions are not dispositive. The district court's reliance on such authority was misplaced.

As correctly stated by the district court: "Whether a public utility such as the East Rio Hondo Water Supply Corporation is covered by the Voting Rights Act is primarily a question of federal law." App. 5. Moreover much of the state law authority relied on by the appellees and the district court on this point has been modified by subsequent state law enactments. The question in the case cited by the movants/appellees and by the district court was whether water supply corporations were political subdivisions of the state for the purpose of qualifying for an exemption from ad valorem taxation. *Tarrant County Water Supply Corporation v. Murst-Euless Bedford Independent School District*, 391 S.W. 2d 162 (Tex. Civ. App. – Fort Worth 1965, writ ref'd n.r.e.). The question in the Texas Attorney General opinion, Op. Atty. Gen. 1972, referenced by the district court was whether water supply corporations were political subdivisions of the state for

purposes of qualifying for the state's water related financial assistance programs. Although the answer in both instances was no, this authority has lost any probative value with recent changes in Texas law. State law was amended so that water supply corporations are now exempt from some ad valorem taxation, TEXAS TAX CODE ANN. § 11.30 (Vernon Supp. 2001) and are now defined as "political subdivisions" of the state so as to qualify for water related financial assistance programs. TEXAS WATER CODE ANN. §§ 15.001, 16.001, 17.001, 17.002 (Vernon Supp. 2000).

Finally, movants/appellees' and the district court's discounting of the requirements under Texas Open Records and Open Meetings Acts as not probative of the issue here is also flawed.[2] The movants/appellees and the district court acknowledged that water supply corporations were "governmental bodies" of the state, but

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[2] Movants/Appellees also imply that for the East Rio Hondo Water Supply Corporation, compliance with the requirements of the Open Meetings and Open Records Acts is voluntary because of its decision to choose to apply for federal funds and for an ad valorem tax exemption and therefore they should not be classed as political subdivisions of the state. Motion to Affirm, p. 7. Their position is of no consequence. When residents of an unincorporated community choose to incorporate and become a city, they do so voluntarily, yet once incorporated they are nevertheless political subdivisions of the state and covered under the VRA. Moreover, the Open Meetings and Open Records Acts do not contain any opt in or opt out provisions; do not contain any prerequisite for federal funds as a condition of compliance with Acts' requirements and only require that the water supply corporation be exempt for ad valorem taxation under § 11.30 of the Tax Code, which the East Rio Hondo Water Supply Corporation is. Thus, there is no dispute but that the East Rio Hondo Water Supply Corporation must comply with the requirements of the Open Meetings and Open Records Acts.

reasoned that because water supply corporations are included in a separate paragraph in the section of the Acts' definitions of "governmental bodies" than where the term political subdivisions is contained: "The texts of the statutes leave, however, no room for doubt that such a corporation is *not* a 'political subdivision'." App. 7. Using the district court's logic, however, Texas school districts, Texas municipal governing bodies, and Texas county commissioners courts would also be excluded as "political subdivisions" under the Voting Rights Act, since they are all also defined as governmental bodies in separate paragraphs. TEXAS GOVERNMENT CODE ANN. §§ 552.003(a)(2)(3)(5) and 551.001(3)(B)(C)(E) (Vernon Supp. 1994). It goes without saying however, that Texas cities, school boards and county commissioners courts are in fact "political subdivisions" of the state under the Voting Rights Act.[3]

A fair review of the functions of the East Rio Hondo Water Supply Corporation and its relationship to the state leaves no room for doubt. The East Rio Hondo Water Supply Corporation is a "political subdivision" under the

[3] Movants/Appellees further contend that there is no probative value in these requirements since other unspecified bodies included in the definition of "governmental body" in the state statutes are clearly not "political subdivisions." Motion to Affirm, pp. 7-8. Critically, movants fail to identify any such "governmental bodies" to which the Voting Rights Act does not apply which engaged in voting.

Voting Rights Act. The district court's judgment should be reversed.

Respectfully submitted,

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